LIBRARY
SUPREME COURT, U. S.

FILED
JUL 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 330

ROBERT B. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

THOMAS F. CALL,
523 West Sixth Street,
Los Angeles, Calif. 90014,
Attorney for Petitioner
Robert B. Roberts.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Orders and Opinion Below	2
Jurisdiction	3
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
The Facts of Counts Three, Six and Eight of the Indictment of Which Petitioner's Conviction Was Affirmed	10
Reasons for Granting the Writ	12
1. Did the Court of Appeals Err in Not Remanding This Case to the United States District Court for the Southern District of Florida for a New Trial Under the Rule Announced in O'Brien v. United States, Supra? Does the Decision of the Court of Appeals With Respect to Its Interpretation of Pinkerton v. United States, 328 U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180, Conflict With the Decisions of This Court in Nye and Nissen, 93 L. Ed. 919, 336 U.S. 613, 69 S. Ct. 766, and Pereira v. United States, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435?	12
Conclusion	21

INDEX TO APPENDICES

	Page
Appendix "A." Motion for Remand	App. p. 1
Appendix "B." Motion of Appellant Robert B. Roberts to Remand to the United States District Court for a New Trial or, in the Alternative, for Further Hearing in the United States District Court	App. p. 4
Appendix "C." Motion for Remand Denied	App. p. 7
Appendix "D." Motion to Reconsider Motion of Appellant Robert B. Roberts to Remand to the United States District Court for a New Trial	App. p. 8
Appendix "E." Motion to Reconsider Denied	App. p. 10
Appendix "F." Opinion of the Court of Appeals	App. p. 11
Appendix "G." Order Denying Rehearing	App. p. 19
Appendix "H." Statutes Involved	App. p. 20

TABLE OF AUTHORITIES CITED

Cases

Black v. United States, 385 U.S. 26 2

Gradsky v. United States, 342 F. 2d 147 2

Krulewitch v. United States, 93 L. Ed. 7, 336 U.S. 440 15

Levine v. United States, 383 U.S. 265, 86 S. Ct. 295, 15 L. Ed. 2d 737 ..... 1, 13, 19

Nye and Nissen v. United States, 93 L. Ed. 919, 336 U.S. 613, 69 S. Ct. 766 ..... 12, 13, 14, 15, 16, 17

O'Brien v. United States, 87 S. Ct. 1158 ..... 1, 2, 4, 12

Parr v. United States, 4 L. Ed. 2d 1277, 363 U.S. 370, 80 S. St. 1171 18

Pereira v. United States, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435 ..... 12, 14, 16, 17, 18

Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 ..... 12, 13, 14, 15, 16, 17

Williams v. United States, 278 F. 2d 535 18

Rules

Federal Rules of Criminal Procedure, Rule 37(c) 3

Statutes

United States Code, Title 15, Sec. 77 q(a) 4

United States Code, Title 18, Sec. 2(a) 17

United States Code, Title 18, Sec. 371 4

United States Code, Title 18, Sec. 1341 4

United States Code Annotated, Title 28, Sec. 1254 (1) 3

TABLE OF AUTHORITIES CITED

Cases

Page

Black v. United States, 385 U.S. 26 2

Grudsky v. United States, 242 F. 2d 127 2

Krulewitch v. United States, 93 L. Ed. 7, 336 U.S. 440 15

Lawn v. United States, 355 U.S. 339, 2 L. Ed. 2d 321 ..... 13, 19

Nye & Nissen v. United States, 336 U.S. 613, 93 L. Ed. 919 16

O'Brien v. United States, 386 U.S. 345, 87 S. Ct. 1158 ..... 1, 4, 12

Parr v. United States, 4 L. Ed. 2d 1277, 363 U.S. 370, 80 S. Ct. 1158 18

Pereira v. United States, 347 U.S. 1, 74 S. Ct. 358 18

Rickert v. United States, 252 U.S. 110, 64 S. Ct. 1130, 1139, 88 L. Ed. 1469 ..... 12, 13, 14, 15, 16, 17

Williams v. United States, 273 F. 2d 515 18

Rules

Federal Rules of Criminal Procedure, Rule 52(b) 4

Statutes

United States Code, Title 18, Sec. 2(a) 4

United States Code, Title 18, Sec. 371 4

United States Code, Title 18, Sec. 1461 4

United States Code Annotated, Title 28, Sec. 1254 (1) 2

IN THE

Supreme Court of the United States

October Term, 1967

No. ———

ROBERT B. ROBERTS, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

This Court has previously granted a Writ of Certiorari in this case. *Levine v. United States* (1966), 383 U.S. 265, 86 S. Ct. 295, 15 L. Ed. 2d 737.

Petitioner, Robert B. Roberts, Appellant below, respectfully prays that a Writ of Certiorari issue vacating the judgment and conviction and remanding the case to the United States District Court for the Southern District of Florida for a new trial, under this Court's ruling in *O'Brien v. United States*, 87 S. Ct. 1158.

Petitioner, Robert B. Roberts, additionally prays that a Writ of Certiorari issue to review so much of a judgment of the United States Court of Appeals for the Fifth Circuit as affirmed the judgment of conviction

of the District Court for the Southern District of Florida, as to Counts Three, Six, Eight and Ten of the Indictment. The Court of Appeals had previously reversed in *Gradsky v. United States*, 342 F. 2d 147, as to Counts One, Two, Four, Five, Seven and Nine of the Indictment. The Judgment, thus affirmed in part, was entered upon a general verdict after trial by jury.

Orders and Opinion Below.

Subsequent to oral argument before the Court of Appeals following the granting of the Petition for Writ of Certiorari by this Court, the Department of Justice filed a Motion for Remand to the United States District Court for a new trial as to Appellant George Levine only because of this Court's ruling in *Black v. United States*, 385 U.S. 26. A copy of this Motion is printed in Appendix "A" to this Petition. On April 11, 1967, Petitioner filed a Motion to Remand to the United States District Court for a new trial. This Motion is printed in Appendix "B" to this Petition. On May 3, 1967, the Court of Appeals denied Petitioner's Motion without prejudice to such application by him to the District Court as may be appropriate. A copy of this Order is printed in Appendix "C" to this Petition. Petitioner then filed a Motion to Reconsider the Motion to Remand to the United States District Court for a New Trial in light of this Court's ruling in *O'Brien v. United States*, supra. A copy of this Motion is printed in Appendix "D" to this Petition. On May 25, 1967, the Court of Appeals denied Petitioner's Motion to Reconsider. A copy of this Order is printed in Appendix "E" to this Petition. The Opinion of the Court of Appeals is not yet reported but is printed in Appendix "F" to this Petition. A petition for

Rehearing was timely filed and thereafter the Court of Appeals entered its Order Denying Rehearing without Opinion. A copy of this Order is printed in Appendix "G" to this Petition.

Jurisdiction.

1. The judgment sought to be reviewed was entered May 2, 1967.

2. Petitioner filed timely a Petition for Rehearing which was denied on June 5, 1967.

3. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question are 28 U.S.C.A., Sec. 1254(1) and Rule 37(c) of the Federal Rules of Criminal Procedure.

4. The grounds upon which that jurisdiction is invoked are that the Court of Appeals in affirming in part has decided an important question of Federal law, arising under the criminal laws, which has not been, but should be considered and settled by this Court; has rendered a decision in conflict, on other questions involved, with the decisions of this Court and with other Courts of Appeal on a similar matter; has decided other important questions of Federal Criminal law in a way in conflict with applicable decisions of this Court, and has sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Questions Presented.

1. Did the Court of Appeals err in refusing to vacate the judgment and conviction and in not remanding the case to the United States District Court for the Southern

District of Florida for a new trial under this Court's ruling in *O'Brien v. United States, supra*?

2. Did the Court of Appeals err in stating legal principles not applicable to the facts shown in the record below and contrary to decisions of this Court?

3. Did the Court of Appeals err in refusing to review on remand by this Court the evidence, the applicable principles of law, the instructions to the jury and the lack of essential jury instructions to determine whether Petitioner was entitled to further relief regarding his conviction for the substantive offenses?

Statutes Involved.

The statutes involved are 15 U.S.C. 77 q(a), fraud in the sale of securities; 18 U.S.C. 1341, mail fraud; and conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371. (The text of these statutes are set forth in Appendix "H" to this Petition).

Statement of the Case.

By Indictment filed June 14, 1961, Petitioner was accused jointly with ten other codefendants of multiple violations of 15 U.S.C. 77 q(a), fraud in the sale of securities (set forth in Counts One through Five inclusive of the Indictment); 18 U.S.C. 1341, mail fraud (set forth in Counts Six through Nine inclusive of the Indictment); and in Count Ten of the Indictment of conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371. Each of the substantive offenses in Counts One through Nine was listed as an overt act in Count Ten.

After trial on the above charges, Petitioner was convicted upon all Counts as were all other defendants. His application for probation was denied, as was his motion for new trial, and he was sentenced for a period of one year on each Count with the sentences to run consecutively.

The charges against Petitioner arose out of the operation and subsequent bankruptcy of the Credit Finance Corporation (herein referred to throughout as "CFC"), a Florida corporation. CFC was incorporated on November 19, 1958, with the Articles of Incorporation being signed by Defendant Leonard Glaser, as President and Director owning 100 shares of stock, Geraldine Glaser, as Secretary and Director owning 50 shares of stock, and by Sylvia Wagner, as secretary and Director owning 50 shares of stock, with all of the stock being issued at a price of $50.00 per share [Govt. Ex. 2]. Later, all of the stock was acquired by Defendants Norman and B. J. Gradsky and, in turn, sold by them to the Security Guaranty Company on April 1, 1960. Security Guaranty Company subsequently sold the stock to Defendant George Levine on July 22, 1960 [R. 941, 954, 983, 1395, 1435, 3457, 3630-3631, 3635].

CFC was formed for the principal purposes of lending money to automobile purchasers and purchasing real estate for development of subdivision and commercial building [R. 4293-4294].

During the Gradsky's ownership of CFC, Norman Gradsky was President [R. 1414]. During Security Guaranty Company's ownership, Robert Greene was President and later George Levine became President [R. 1414, 1419]. At no time did Petitioner have any financial interest in CFC, as a shareholder or otherwise [R. 3881-3882].

CFC sold corporate notes to the public in denominations of $1,000.00 paying interest originally at the rate of 12% and later at 8% [R. 1388-1389, 1841]. The reduction in interest was necessitated by a change in Florida law limiting the interest rate to 8% [R. 1841]. The first such note was issued by CFC on April 3, 1959, and the last in October of 1960. In all, notes in the amount of approximately $528,400.00 were issued [R. 3480, 3872-3873].

The evidence indicated that during the Gradsky's ownership, CFC funds were used to assist in the purchase of their family residence and for the purchase of an airplane and Cadillac automobiles for them [R. 2613, 2733, 3507]. There was additional testimony that the total disbursement of CFC funds to the Gradsky family and "related corporations" amounted to $541,968.25 [R. 3511]. As of July 22, 1960, CFC was insolvent and later became bankrupt [R. 798, 3624].

In the sale of the corporate notes certain representations were made to the potential purchasers. These included statements that CFC was a Florida corporation dealing in land and subdivisions; that CFC owned land next to a subdivision and an office building in Melbourne, Florida; that CFC was checked regularly by the State of Florida; CFC was making money from its investments; that CFC paid 8% interest and dealt in automobile notes; that the accounts were insured, and that CFC helped finance the Baptist Church in Orlando [illegible] and in detail, was [illegible] CFC was [illegible]

audited by the Florida State Comptroller's office, did own buildings and deal in land and subdivisions and at times the corporate notes were secured by an assignment of accounts receivable equal to the amount of the notes thereby being insured [R. 1388-1389, 1444-1445, 2560, 3450-3451, 3454-3455, 3465; Govt. Exs. 57-H, and 31-T]. Petitioner's position throughout the trial was that his representations were made in good faith, honestly believing them to be true, and with no intent to defraud.

CFC maintained offices at both Melbourne and Orlando, Florida [R. 1015, 1881]. The Orlando office was under the supervision of Defendant Gertrude Hogue who was a Vice President of CFC [R. 1388, 1396, 1403]. Petitioner was employed by CFC from August 15, 1959, to April 20, 1960, but only on a part-time basis [R. 1727, 1730, 3873, 3874-3875]. Part of his duties consisted of acting as salesman in the Orlando office [R. 1390]. He received instruction as to these duties from Defendant Hogue who was in charge of the Orlando office [R. 1450, 1726]. As of the time Petitioner ceased his employment with CFC, the Orlando office had received no complaints from customers that the interest and principal had not been paid [R. 1755].

During his employment by CFC, Petitioner received compensation totaling $2,618.70 which averaged $243.00 per month for the nine-month period. In addition, he was reimbursed for his out-of-pocket expenses [R. 3876-3877, 3879]. A SEC investigator testified that he found nothing improper or irregular in any of these payments.

At no time was Petitioner a Director or shareholder of CFC, have any financial interest in the company, nor

was he authorized to sign checks on behalf of the company [R. 3880-3882]. He had no connection with the company books and records, made no entries therein and had no knowledge of the financial condition of CFC [R. 3880-3882, 3884, 3895, 1755-1756]. He signed no deeds on behalf of CFC for the acquisition of real property and no contracts for the purchase of any personal property [R. 3885, 4011-4012]. CFC made no payments for or on behalf of Petitioner. He borrowed no money from CFC and received nothing from CFC to which he was not entitled [R. 3887-3888].

There was no evidence that Petitioner mailed, signed, knew of any mailing or caused any mailing of letters of solicitation to the investors of CFC.

Of the several hundred Exhibits introduced during the trial, only ten pertained to Petitioner. Exhibit 4 was a certified copy of the Articles of Incorporation of Credit Realty Company in which Petitioner's name appears as one of the incorporators. The prosecution conceded that this signature was a forgery [R. 4236]. Exhibit 19 was Petitioner's appearance bond in the within action. Exhibits 74, 107 and 109 were CFC notes containing Petitioner's name as a Vice President of CFC. Exhibits 96 and 108 were receipts for a note containing Petitioner's name. Exhibits 144 and 146 were lease agreements for advertising in which Petitioner alone appears as signing for CFC. In Exhibit [illegible] Petitioner's name appears as witness to a lease. There was no evidence that Petitioner in fact signed any of these documents or that the signatures thereon were his. Of these ten Petitioner had [illegible] Exhibits were from CFC solicitation literature, only 7 mentioned Petitioner. Exhibit [illegible] CFC bock-

keeper, stated that in March and April 1960 Petitioner was in the Orlando office of CFC but that he wasn't doing anything [R. 943]. Mrs. Hightower, a secretary in the CFC Orlando office, testified that Petitioner was reprimanded by Mrs. Hogue for telling a prospective customer that the money was insured and that he was told by Mrs. Hogue that he would be discharged if he did it again [R. 1452, 1739, 1751]. She further testified that Petitioner terminated his employment with CFC in April 1960 [R. 1391]. Stanton Mooney, an investor, testified that Petitioner prepared, but didn't sign a note in the sum of $2,000.00 [Ex. 74, R. 1836-1837, 1901]. Mr. Ver Pault, another investor, testified that Petitioner picked up an expired note of his and signed a receipt for it and that Petitioner told him that a Florida regulation required the company to pay only 8 per cent instead of the 12 per cent previously paid [Ex. 96, R. 2132-2133, 2161]. Another investor, Mr. Kryway, testified that Petitioner helped him carry a television set to his car from the CFC office [R. 1932]. Mary Reilly, also an investor, stated she met Defendant Gibbons and Petitioner at the Orlando office in December 1959 and that in a conversation with them, she was told that the investor's money was insured [R. 2226, 2228]. She did not recall whether Gibbons or Petitioner made that statement [R. 2248]. George Callahan, a SEC investigator, testified as to Petitioner's salary and that he found nothing improper or irregular concerning these payments [R. 3876-3877, 3879]. He further stated that Petitioner was a part-time employee of CFC between August 1959 and April 1960 and after April 20, 1960, was no longer with CFC [R. 3873-3876].

[illegible] Count Three alleges a fraudulent sale to Mr. and Mrs. Kryway accomplished by a letter placed in the mails in Orlando, Florida, on March 17, 1960. Mr. Kryway stated that after seeing an advertisement in the paper, he went to the CFC office and spoke to Defendant Hogue who explained to him the limitations on non-resident investment, gifts for investors, and asserted CFC had assets of $5,000,000 and was engaged in the real estate and [illegible] business in Florida [R. 1917-1920]. Mr. Krywey received a note for $3,000 signed by Defendant Hogue in an envelope postmarked Orlando and dated March 17, 1960 [Govt. Ex. 88, R. 1922]. After his talk with Mrs. Hogue, he had intended to investigate the company further but didn't get around to it [R. 1919]. Petitioner helped Mr. Krywey carry a television set from the CFC office to his automobile but there was no evidence that Petitioner participated in or even was within earshot of the conversation between Mr. Krywey and Mrs. Hogue. Thus, there was [illegible] connecting Petitioner to this Count [illegible]

dated January 25, 1960 [Govt. Ex. 89; R. 1944, 1954]. He had no intention of investing in CFC after receipt of the letter [R. 1944]. In August of 1960 he went to the CFC office in Orlando and met Defendant Schiff who told him that CFC had financed the Baptist Church, had real estate, financed cars and was inspected by the State auditors [R. 1847, 1949-1950]. Mr. Stamper testified that the envelope in which he received the letter [Govt. Ex. 89] was mailed in Orlando because the letterhead had an Orlando address [R. 2081]. There was no evidence at all connecting Petitioner to this Count.

Count Eight alleges a fraudulent sale to Mrs. Virack accomplished by a letter placed in the mail in Orlando, Florida, on January 21, 1960. In January, 1960, Mrs. Virack went to the CFC Orlando office and spoke to Defendant Gibbons who told her that CFC dealt in real estate and automobiles and that her money was as safe as in a bank [R. 1068, 1070]. She then invested $5,000 [Govt. Exs. 53 and 44; R. 1072]. Later she received a letter through the mail signed by Gibbons, dated January 21, 1960, concerning a gift of a camera [Govt. Ex. 46; R. 1078]. She did not retain the envelope in which she received Exhibit 46 and there was no evidence that it was mailed in Orlando [R. 1085-1086, 1088]. There was no evidence connecting Petitioner in any way to this Count.

REASONS FOR GRANTING THE WRIT.

1. Did the Court of Appeals Err in Not Remanding This Case to the United States District Court for the Southern District of Florida for a New Trial Under the Rule Announced in O'Brien v. United States, *Supra*? Does the Decision of the Court of Appeals With Respect to Its Interpretation of Pinkerton v. United States, 328 U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180, Conflict With the Decisions of This Court in Nye and Nissen, 93 L. Ed. 919, 336 U.S. 613, 69 S. Ct. 766, and Pereira v. United States, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435?

Petitioner respectfully suggests that the Court of Appeals should have remanded this case to the District Court for a new trial under the rule announced in *O'Brien v. United States, supra*. In the *O'Brien* case, the Solicitor General conceded that a wiretap had been laid to overhear certain conversations of O'Brien, but stated that the logs of the monitoring agents were not communicated in any manner outside the FBI. This same concession was made by the Solicitor General in the instant case concerning certain conversations of Defendant George Lemm. In the *O'Brien* case, no conversation [illegible] was involved in any way in the trial, but nevertheless was granted a new trial [illegible]. Petitioner believes [illegible] that same position in this case as [illegible] in the *O'Brien* case and therefore [illegible] a new trial.

Petitioner respectfully suggests that the United States Court of Appeals erred in its opinion in stating the fol-

lowing legal principles not applicable to the facts shown by the record below:

1. "A party to a conspiracy is liable as a principal for all offenses committed in furtherance of the conspiracy while he is a member of it. *Pinkerton v. United States*, 328 U.S. 640; 66 S. Ct. 1180, 90 L. Ed. 1489, but a latecomer cannot be convicted as a principal for substantive offenses which were committed in furtherance of the conspiracy before he joined it or after he withdrew from it. *Levine v. United States*, *supra*. In this case, with the exception of Schiff's conviction on Count 8, each appellant stands convicted of only those substantive offenses committed in furtherance of the conspiracy while he was a member of the conspiracy. There is thus no error." [Opin. p. 6]. An instruction on the *Pinkerton* theory was not given in the case at bar. [R.T. 4298]. The Government's Requested Instruction No. 47 on the *Pinkerton* theory was refused by the trial court. The result of the Court of Appeals' foregoing statement is that a defendant may be convicted of substantive offenses committed in furtherance of the conspiracy while he is a member of the conspiracy even though no *Pinkerton* instruction was given to the jury. This does not correctly reflect existing law.

Nye and Nissen v. United States, *supra*, and *Pinkerton* make it clear that membership in a conspiracy alone (unless the jury is properly instructed) does not make a conspirator vicariously liable for substantive offenses committed by other co-conspirators. A conspirator can be found guilty of a substantive offense even though he did not aid them [illegible] the conspiracy, provided the substantive offense was committed in furtherance [illegible] as a part of the conspiracy. With this limitation [illegible] that the jury be given precise instructions on the point.

If the jury was not so instructed, the *Pinkerton* doctrine is inapplicable. As stated in *Pereira v. United States, supra*, at page 445, "The Pinkerton case, however, is inapplicable here since the jury was not instructed in terms of that theory." Also, *Nye and Nissen, supra*, at page 925, holds that "A verdict on that theory (Pinkerton) requires submission of those fact issues to the jury."

This Court in *Nye and Nissen* and in *Pinkerton* itself recognizes that this doctrine is available only if (1) there is a connection between the conduct of the conspirator and the commission of the substantive offense and (2) the jury has been instructed that evidence establishing guilt of conspiracy cannot be used as a basis for conviction upon the substantive counts unless it has found the necessary connection to exist and further found that the acts referred to in the substantive counts were acts in furtherance of the conspiracy. *Nye and Nissen v. United States, supra*, at page 926. *Pinkerton* is needed to inform the jury of the condition under which they might use a finding of guilt of conspiracy as circumstantial evidence of guilt of the substantive counts. Lacking a *Pinkerton* instruction, the finding that a conspiracy existed cannot be used to fill out the circumstantial evidence for it cannot be assumed without a *Pinkerton* instruction that the acts constituting the conspiracy were found to be acts aiding and abetting the substantive counts or that the substantive counts were acts in furtherance of the conspiracy.

The judgment against Pettibone can be upheld only if the proof adduced and the basis on which it was submitted to the jury was sufficient to support the verdict. It is only when the jury has been properly instructed as

to the relevant standards to be applied to the evidence does a basis exist for determining whether evidence sufficient to support the verdict was present. Accordingly, the relevant question is not was the evidence sufficient, but rather was it sufficient to fulfill the required standards. *Nye and Nissen v. United States*, *supra*, at page 926.

It should be noted that the Pinkerton doctrine is questionable legal authority at this time. As stated in *Krulewitch v. United States*, 93 L. Ed. 7, 336 U.S. 440, 445, (Mr. Justice Jackson concurring opinion joined in by Justices Frankfurter and Murphy), "A recent tendency has appeared in this Court to expand this elastic offense and to facilitate its proof. In *Pinkerton*, it sustained a conviction of a substantive crime where there was no proof of participation in or knowledge of it upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting."

2. "Appellants also urge that the District Court should have charged that to find an appellant guilty of a substantive offense in which he did not directly participate, the jury must determine that the substantive offense was committed in furtherance of the conspiracy of which he was a member. We doubt that this contention is properly before us on remand but we note that no appellant either requested this instruction be objected to the failure of the court to give it, although the court heeded most of the objections made to its charges. * * * In any event, the purpose of such an instruction is to preclude the possibility of convicting a defendant for a substantive offense committed by other members of the conspiracy of which the defendant is a member in furtherance of a conspiracy of which the defendant is not

a member. The instruction thus was unnecessary here for there was evidence of only one conspiracy." [Opin. p. 7.]

The purpose of such an instruction is other than that stated by the Court of Appeals. The purpose is to inform the jury of the conditions under which they might use a finding of guilt of conspiracy as circumstantial evidence of guilt on the substantive act. It cannot be assumed, in the absence of such an instruction, that the acts referred to in the substantive counts were acts in furtherance of the conspiracy, nor can it be assumed that the acts constituting the conspiracy were found by the jury to be acts aiding and abetting the substantive counts. *Nye and Nissen*, *supra*, at page 928.

The Court of Appeals further suggests that because Petitioners did not request a *Pinkerton* instruction, nor object to the failure of the trial court to give it, will prevent Petitioner from presenting the error on appeal. Petitioner's liability for substantive offenses committed during the time he was allegedly connected with a conspiracy can be predicated upon three legal theories, and only three:

1. Direct participation in the commission of the substantive offense. In the case at bar, the trial court instructed the jury only on this theory [R. [illegible]; *Pinkerton v. United States*, *supra*, at page [illegible]. As stated in *Pereira v. United States*, [illegible] 347 U.S. 1, 14; 74 S. Ct. 358, [illegible] did not participate directly in [illegible] to accomplish the thirty-five [illegible] from El Paso to Los Angeles. [illegible] all, only as an aider and

2. Aiding and abetting another in committing an offense. 18 U.S.C. §2(a); *Pinkerton v. United States, supra,* at page 1497. No instruction on aiding and abetting was given in the case at bar. It is clear that a verdict on this theory requires submission of those fact issues to the jury. "The 'aiding and abetting' instruction entitled the jury to draw inferences supplying any lack of evidence directly connecting the petitioner Brading with the specific acts charged in the indictment from the abundant circumstantial evidence offered. The jury was properly charged on the theory." *Pereira v. United States, supra,* at page 445; *Nye and Nissen v. United States, supra,* at page 925 states "We see therefore no reason to exculpate him as an aider and abettor. There was no inadequacy in the charge to the jury on that theory."

3. Commission of a substantive offense by a co-conspirator as a part of and in furtherance of the conspiracy. *Pinkerton v. United States, supra.* An instruction on this theory was not given in the case at bar.

Petitioner is not concerned with, does not decide or have anything to do with the Government's theory of criminal responsibility. If the Government elects to proceed on the theory that Petitioner's guilt is predicated only as that of a direct participant in the commission of the substantive offenses, Petitioner's counsel would be derelict in his duty to suggest that a *Pinkerton* or aiding and abetting instruction also be given, thereby increasing Petitioner's exposure to a guilty verdict and an affirmance on appeal.

Petitioner's contention before this Court is that the proof adduced below and the basis on which it was submitted to the jury was insufficient to support the verdict.

The only postulate submitted to the jury on the question of Petitioner's guilt on the substantive offense was that of a direct participant [R. p. 4298]. Therefore, for that offense, guilt is individual and personal, not vicarious. To convict on the substantive counts, Petitioner actually must have used the mails as part of the execution of the scheme to defraud and in furtherance of the plan or he must have known, or reasonably have been expected to know, that the mails would be used. *Pereira v. United States, supra,* at page 447; *Parr v. United States,* 4 L. Ed. 2d 1277, 363 U.S. 370, 80 S. Ct. 1171.

As to Counts Three, Six and Eight, the record is barren of any evidence that Petitioner participated in a scheme to defraud which reasonably contemplated the use of the mails, and is equally barren of any evidence that Petitioner himself used the mails in furtherance of the plan. There is no evidence that Petitioner prepared or signed any document that was mailed or mailed any document or knew of any mailing or caused any mailing of any kind. *Pereira v. United States, supra,* at page 447; *Parr v. United States, supra,* at page 1290; *Williams v. United States,* 278 F. 2d 535, 537 (9th Circuit).

3. "We thus direct our attention to whether, in light of the Solicitor General's concession as to applicable legal principles, the members of the conspiracy 'are entitled

to further relief regarding the convictions for the substantive offense.'" [Opin. p. 5]

Petitioner contends that the Court of Appeals has too narrowly interpreted this Court's previous Writ of Certiorari in refusing to review the evidence, the applicable principles of law, the instructions to the jury and the lack of essential jury instructions to determine whether Petitioner is entitled to further relief regarding his conviction for the substantive offenses.

As heretofore stated, this Court has granted a prior Writ of Certiorari in this case "limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined the conspiracy or after they had withdrawn from it." The petitions were denied in all other respects. *Levine v. United States*, 383 U.S. at page 266. In disposing of this case, this Court said:

> "In response to specific questions addressed by this Court, the Solicitor General has made a two-pronged concession: First, he concedes that an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy; and second, he concedes that in this case some of the convictions for the substantive offenses must be reversed because they are inconsistent with this principle. On the basis of this concession, and upon consideration of the entire record, we vacate the judgment of the Court of Appeals insofar as it affirms petitioners'

convictions for the substantive offenses. We remand the case to that court with instructions to reverse the convictions the Solicitor General concedes must be reversed, and to determine, in light of the concession, the evidence, the instructions to the jury, and the applicable principles of law, whether in addition to the relief conceded by the Solicitor General petitioners are entitled to further relief regarding the convictions for the substantive offenses."

The opinion of the Court of Appeals did not consider the evidence, the instructions to the jury, or the applicable principles of law in determining whether petitioner was entitled to further relief regarding the convictions for substantive offenses. Footnote No. 3 on Page 5 of the Opinion of the Court of Appeals sets forth the errors asserted by Petitioners on remand which that Court refused to review on remand, as follows:

"The following were submitted and considered on the appeal and are re-submitted again in this proceeding: The appellants' contention that the district court erred in refusing to instruct on the essential elements of conspiracy and of the substantive offenses; the lack of evidence to sustain a conviction on direct participation, yet the failure to instruct on aiding and abetting or the commission of a substantive offense by co-conspirator as a part of and in furtherance of the conspiracy; failure to instruct on specific intent and reasonable doubt; failure to give a cautionary, and the contention that the verdict was against the manifest weight of the evidence."

Conclusion.

Petitioner respectfully prays that a Writ of Certiorari issue vacating the judgment of conviction and remanding the case to the United States District Court for the Southern District of Florida for a new trial. Petitioner additionally prays that a Writ of Certiorari should issue to the end that so much of the Court's judgment that affirmed the judgment of the District Court on the substantive Counts may be further reviewed.

Respectfully submitted,

THOMAS F. CALL,
Attorney for Petitioner
Robert B. Roberts.